

The Future of Consumer Credit Regulation. Proposal for a Multi-Layered Consumer Image

§1. Introduction

1. *(Shortcomings of the) Information Paradigm* – When overlooking European Consumer (Credit) legislation, one notices the information paradigm takes a leading role as the optimal consumer protection mechanism¹. According to the information paradigm, the stronger contracting party has to provide mandatory information to its weaker counterparty, *in casu* the consumer. After having read, studied and analyzed the information the weaker contracting party is able to make a carefully thought-out decision. The consumer can thus give its informed consent. The outcome is an agreement, which is supposed to be in the best interest of both.

The information paradigm is seriously criticized. Studies in (behavioral) economics illustrate that the information paradigm is not flawless². The consumer is overloaded with documents and brochures and it is not always clear whether he understands or even reads all the documents³. Furthermore it is questionable whether the information leaflets will protect the consumer suffering from unforeseen economic loss. For example losses suffered due to the economic crisis or to an illness.

2. *Lack off Interest for Alternative Policy Choices* – Although the positive effect of (pre-)contractual information on the level of consumer protection is criticized, no profound (European) research has so far been conducted on contractual protection mechanisms vis-à-vis consumer credit agreements. Examples of such mechanisms are interest rate caps, the right of early repayment and the termination of a credit agreement in case of default.

3. *Limited Balance of Interests* – Another problem that occurs is highlighted by law and economics' studies. They indicate that rules on consumer protection can only be effective if the legal framework achieves a high standard of consumer protection at a minimal cost to creditors⁴. It is questionable whether European and national legislators take these Law and Economics' findings into account, since they disregard studies which show the disproportional costs of the information paradigm for creditors.

4. *Paper overview* – The paper starts with the main reason for choosing the information paradigm in current EU consumer credit regulation, i.e. the information asymmetry. Though also a creditor is confronted with a certain lack of information vis-à-vis the consumer (e.g.

¹ E.g. artt. 4, 5-7 and 10-12, incl. Annexes II and III Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *Pb.L.* 133 of 22 May 2008, 66-92.

² A.o. I. RAMSAY, "From Truth in Lending to Responsible Lending" in G. HOWELLS, A. JANSSEN and R. SCHULZE (eds.), *Information rights and obligations. A challenge for party autonomy and transactional fairness*, Hampshire, Ashgate, 2005, 51.

³ G. HOWELLS en T. WILHELMSSON, "EC Consumer Law: Has It Come of Age?", *E.L.Rev.* 2003, 380-381; C. SUNSTEIN (ed.), *Behavioral law and economics*, Cambridge, Cambridge University Press, 2000, 59-187.

⁴ IP/A/IMCO/ST/2006-20, *Broad economic analysis of the impact of the proposed directive on consumer credit*, http://www.europarl.europa.eu/comparl/imco/studies/0704_consumercredit_en.pdf, 42.

when conducting the consumer's creditworthiness assessment), we will only focus on the information asymmetry on the consumer side. The information paradigm is currently the readiest response of European and national legislators to tackle the problems arising from the information asymmetry. This paper will list the shortcomings of the information paradigm in the field of consumer credit. Secondly, we will address the consumer image. We will see that the consumer image is not unproblematic. In fact, even the Court of Justice uses two different images of the consumer. In an attempt to enhance consumer protection, we propose to set up a multi-layered consumer image in a final paragraph. To make it more viable, we shall apply our multi-layered consumer image to consumer credit law.

§2. Information paradigm

5. *Information asymmetry on consumer side* – When signing the (credit) agreement the consumer should pay attention to the specific characteristics of the product or service. Moreover, he must know the normal use of that product or service. There will not be a truly informed decision ("*informed consent*") if he does not have a correct understanding of these two elements⁵. If not, an information asymmetry exists. There are two ways to solve this information asymmetry⁶. Either one merely has confidence in the functioning of the free market or one accepts that information requirements have to be legally imposed.

6. *Criticism on the information paradigm* – In this paragraph we discuss both solutions, although the legislator often (instantly) chooses for mandatory information disclosure. However (behavioural) law and economics studies show certain market failures undermine the usefulness of the information paradigm as an optimal method of consumer protection in the field of consumer credit. Examples of such market failures are higher transaction costs, the free-rider problem, behavioural abnormalities which cause consumers to not always act rationally, a lack of real choice for the consumer, etc. We look at this in more detail below.

A. Solutions via the free market

7. *The market mechanism* – In principle, the free market itself should provide for a correct and competitive price(-setting). Ideally, the consumer is looking for and collecting information on the terms and conditions of the credit agreement. Creditors, who charge too much, thus price themselves outside the competitive market. This mechanism operates in a market with (*quasi*-)perfect information for all parties involved. Ideally, the creditor even provides willingly prospective consumers all the information needed in order to attract as many clients as possible. The prospective consumer studies the terms and conditions and finally takes a rational decision, based upon the information obtained and acquired. Some observations to this ideal image of the free market have to be made.

⁵ O. BAR-GILL, "The Behavioral Economics of Consumer Contracts" in O. BAR-GILL and R. EPSTEIN, *Consumer Contracts: Behavioral Economics vs. Neoclassical Economics. An exchange between Oren Bar-Gill and Richard A. Epstein*, <http://ssrn.com/abstract=982527>, New York University School of Law, 2007, 38.

⁶ There exists also an information asymmetry on creditor side. After all, he must assess the creditworthiness of the consumer. He does not have perfect information here. The consultation of data bases or direct information gathering of the consumer does not give him a complete and/or accurate picture of the financial situation of the consumer. In this paper we do not look closer at this problem. After all, we focus on a critical evaluation of the information paradigm as a method of consumer protection.

8. *Transaction costs of seeking consumer* – Firstly, the image of the seeking consumer is an utopian image⁷. Not every consumer looking long enough or even looking for the correct information. Sometimes this behaviour can be explained by the irrational choices certain consumer make. Nonetheless, also rational consumers shall stop at a certain stage their quest for information. More precisely, when the research costs outweigh the advantage that one hopes to achieve from the credit agreement⁸.

9. *Free-rider problem* – Secondly, a creditor does not always benefit if he willingly and fully discloses information to the consumer. The free-rider problem tempers his desire to give complete and accurate information. The hope of a competitive advantage is after all rather quickly superseded by the fear that the transaction costs made, will also serve for the benefit of competing creditors. After all, they have little additional transaction costs. Indeed the creditor, who fully informed the consumer, has already provided lots of general information that should not be repeated by other creditors⁹.

10. *Behavioural deviations* – Thirdly, certain behavioural abnormalities lead to market failures in the market for (consumer) credit. The main behavioural abnormalities are:

- "Information overload";
- procrastination of the consumer;
- "Loss aversion";
- "Mental accounting"; and
- the "Status quo bias"¹⁰.

11. *Behavioural deviation (I): information overload* – Consumers are inundated with advertisements, prospectuses, pre-contractual information brochures, etc.¹¹. This information overload leads to three possible market failures, i.e.:

⁷ R. HYNES and R. POSNER, "The Law and Economics of Consumer Finance", *Am. L. & Econ. Rev.* 2002, 172-173.

⁸ A. I. OGUS, *Regulation: Legal Form and Economic Theory*, Oxford, Clarendon Press, 1994, 128.

Cf. also POSNER: "(...) incompletely informed decisions are rational when the costs of acquiring more information exceed the likely benefits in being able to make a better decision". Cf. R. POSNER, *Economic analysis of law*, New York, Aspen Law and Business, 2003, 18.

⁹ O. BAR-GILL and E. WARREN, "Making Credit Safer", *U. Pa. L. Rev.* 2008, 117-120; C. CAMERER, S. ISSACHAROFF, G. LOEWENSTEIN, T. O'DONOGHUE and M. RABIN, "Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism'", *U. Pa. L. Rev.* 2003, 1252; R. HYNES and R. POSNER, "The Law and Economics of Consumer Finance", *Am. L. & Econ. Rev.* 2002, 173.

¹⁰ CBFA, *Verslag over het bevorderen van de financiële kennis in België*, http://www.cbfa.be/nl/consultations/lop/pdf/2008-10_promotion.pdf, 2008, 23-25; D. DE MEZA, B. IRLENBUSCH and D. REYNIERS, *Financial Capability: A Behavioural Economics Perspective*, <http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf>, 2008, 22-52.

¹¹ E.g. the General Regulations of April 1, 2010 of ING Belgium NV is 77 pages long. (http://www.ing.be/xpedio/groups/transaction/@transaction/@ibe/@homebank/documents/portalcontent/060776_nl.pdf).

BAYOT, MONNIER and ROLAND analysed on behalf of the POD Maatschappelijke integratie the socially responsible nature of advertisements for credit facilities in the Belgian market. Cf. B. BAYOT, T. MONNIER and L. ROLAND, *Zijn reclame en verkooppraktijken voor kredietopeningen verantwoord?*, Réseau Financement Alternatif, 2010, 18-45.

- not reading the information;
- incorrectly processing the obtained information; and
- the deception of the consumer.

Firstly, many consumers lose their mind when overlooking the vast amount of information leaflets. They then choose to avoid all of it or almost everything¹². This does not necessarily include irrational behaviour. The high information processing costs do not outweigh the eventual benefits, such as obtaining a cheaper credit agreement¹³.

Secondly, the unclear information overload also emphasises the negative consequences of cognitive defects each man has. A consumer possibly incorrectly processes the information. He may also overestimate his own financial knowledge¹⁴. This 'knowledge'-optimism is common to both low- as high-skilled individuals¹⁵. Finally, the average consumer often does not understand the language and content of the information brochures. Thus, DE MUYNCK states that "*a common critique is that European information requirements tend to prefer the side of the seller's/provider's professional wording instead that of the consumer*"¹⁶. It is therefore important that the creditor provides the information in an understandable manner to the consumer¹⁷.

Thirdly, the information overload increases the risks on misleading consumers. It leads consumers in fact away from the core (terms and conditions) of the credit agreement. The

Cf. also a study of OIVO showing that consumers become more critical in the processing of advertising messages. OIVO, *Het verzet van de consument*, <http://www.oivo-crioc.org/files/nl/6208nl.pdf>, 2011, 37p.; X, "Belgische consument wantrouwt reclame", *De Standaard* October 19, 2011.

¹² G. HOWELLS and T. WILHELMSSON, "EC Consumer Law: Has It Come of Age?", *E.L.Rev.* 2003, 380-381; TH. WILSON, N. HOWELL and G. SHEEHAN, "Protecting the Most Vulnerable in Consumer Credit Transactions", *JconsP* 2009, 124.

¹³ V.P. GOLDBERG, "Institutional Change and the Quasi-Invisible Hand", *Journal of Law and Economics* 1974, 485; D. M. GREYER, A. SCHWARTZ and L. L. WILDE, "The Irrelevance of Information Overload: an Analysis of Search and Disclosure", *S. Cal. L. Rev.* 1985-1986, 279-280; C. WILLETT, *Fairness in consumer contracts: the case of unfair terms*, Aldershot, Ashgate, 2007, 42-43.

¹⁴ D. DE MEZA, B. IRLENBUSCH and D. REYNIERS, *Financial Capability: A Behavioural Economics Perspective*, <http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf>, 2008, 50; I. RAMSAY, "From Truth in Lending to Responsible Lending" in G. HOWELLS, A. JANSSEN and R. SCGULZE (eds.), *Information rights and requirements. A challenge for party autonomy and transactional fairness*, Hampshire, Ashgate, 2005, 52.

¹⁵ G. HOWELLS and T. WILHELMSSON, "EC Consumer Law: Has It Come of Age?", *E.L.Rev.* 2003, 381; C. SUNSTEIN (ed.), *Behavioral Law and Economics*, Cambridge, Cambridge University Press, 2000, 59-187.

¹⁶ M. DE MUYNCK, "Credit Cards, Overdraft Facilities and European Consumer Protection. A Blank Cheque for Unfairness?", *ERPL* 2010, 1222.

¹⁷ Cf. also art. 5 Directive 93/13/EC which states that "*in the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail*"; BIS, "A Better Deal for Consumers. Economic Narrative", <http://www.bis.gov.uk/files/file52074.pdf>, 2009, 22; R. INCARDONA and C. PONCIBÒ, "The average consumer, the unfair commercial practices directive, and the cognitive revolution", *JconsP* 2007, 34; J. KÖNDGEN, "Policy Responses to Credit Crises: Does the Law of Contract Provide an Answer?" in S. GRUNDMANN and Y.M. ATAMER (eds.), *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting*, Kluwer Law International, Alphen a/d Rijn, 2011, 46; R. STEENNOT, "Sanctioning van inbreuken op het consumentenrecht: de zoektocht naar een rechtvaardige oplossing" in F. EVERS and P. LEFRANC (eds.), *Kiezen tussen recht en rechtvaardigheid*, Bruges, Die Keure, 2009, 146; A. TIFFE in cooperation with M. FEIGL, "Best Practice beim verantwortlichen Kreditgeschäft – Corporate Social Responsibility in der Bankenpraxis", <http://www.verantwortliche-kreditvergabe.net>, 2008, 82-83.

more information you give or how more certain elements of the information are emphasized, the more likely it is that people are being misled¹⁸. This criticism is often tackled by adopting formal requirements¹⁹.

12. *Behaviour deviation (II): procrastination* – Research showed that every man wants to consume in short term, but to pass the costs of consuming on to the future²⁰. This behaviour is not entirely irrational. Money has after all a time value, i.e. by taking into account the future value of X EUR today²¹. Information, in particular advertising, however, can play a negative role. Emphasising the need to possess a particular good in conjunction with advertisements for obtaining easy credit may encourage consumers to consume rather than to save money and/or to pay off other debts. The rules on misleading and aggressive commercial practises are adopted in order to prevent excesses. One can also warn borrowers about the consequences of their procrastinating behaviour²². DE MUYNCK pleads for a text message that should alert consumers when using credit cards:

¹⁸ D. DE MEZA, B. IRLBUSCH and D. REYNIERS, *Financial Capability: A Behavioural Economics Perspective*, <http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf>, 2008, 49-50; H. JACQUEMIN, "Focus sur certains mécanismes de protection du consommateur de produits et services financiers en matière contractuelle" in H. DAEMS, I. DE MEULENEERE, R. FELTKAMP, C. HOUSSA and R. STEENNOT (eds.), *Bescherming van de consument in het financieel recht. La protection du consommateur en droit financier*, Limal/Antwerp-Oxford, Anthemis/Intersentia, 2012, 134; J. LACKO and J. PAPPALARDO, *The effect of mortgage broker compensation disclosures on consumers and competition: A controlled experiment*, <http://www.ftc.gov/os/2004/01/030123mortgagefullrpt.pdf>, 2004, 7-8; R. STEENNOT, "Sanctionering van inbreuken op het consumentenrecht: de zoektocht naar een rechtvaardige oplossing" in F. EVERS and P. LEFRANC (eds.), *Kiezen tussen recht en rechtvaardigheid*, Bruges, Die Keure, 2009, 146-147.

¹⁹ C. CAMERER, S. ISSACHAROFF, G. LOEWENSTEIN, T. O'DONOGHUE and M. RABIN, "Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism'", *U. Pa. L. Rev.* 2003, 1230; R. INCARDONA and C. PONCIBÒ, "The average consumer, the unfair commercial practices directive, and the cognitive revolution", *JconsP* 2007, 32; R. STEENNOT, "Informatieverplichtingen als beschermingstechniek bij de verwerving van beleggingsdiensten door consumenten" in H. DE WULF, R. STEENNOT, M. TISON and C. VAN DER ELST (eds.), *Van alle markten. Liber Amicorum Eddy Wymeersch*, Antwerp-Oxford, intersentia, 2008, 795; A.S. VANDENBERGHE, "Over de nieuwe zwakheden van de consument en wat eraan te doen", *Ars Aequi* 2009, 393; T. VAN DYCK, *De geharmoniseerde prospectusplicht. Kritische analyse van de geharmoniseerde prospectusplicht in de Prospectusrichtlijn 2003/71/EG en haar omzettingen in België, Nederland, Frankrijk, het Verenigd Koninkrijk en Duitsland*, Bruges, Die Keure, 2010, 98.

²⁰ R. H. STROTZ, "Myopia and inconsistency in dynamic utility maximization", *Review of Economic Studies* 1956, 180. This idea is also found in behavioural economic studies under the term "Hyperbolic Discounting Utility", cf. a.o. D. DE MEZA, B. IRLBUSCH and D. REYNIERS, *Financial Capability: A Behavioural Economics Perspective*, <http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf>, 2008, 23; E. PHELPS and R. POLLAK, "On Second-Best National Saving and Game-Equilibrium Growth", *Review of Economic Studies* 1968, 185-199.

²¹ A. VAN DE VELDE, *Inleiding tot het financiewezen. Financiële markten, producten en instellingen analyse, werking en risico's*, Bruges, die Keure Business & Economics, 2011, 43; C. VAN HULLE with the cooperation of M. DUTORDOIR, K. SMEDTS, K. DE COCK, H. DRIJKONINGEN, T. LIEVENS and A. VANDERLINDEN, *Bank- en financiewezen*, I, Leuven, Acco, 2010, 12.

²² D. DE MEZA, B. IRLBUSCH and D. REYNIERS, *Financial Capability: A Behavioural Economics Perspective*, <http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf>, 2008, 30.

Cf. also art. 5, §2 WCK that oblige lenders to include in certain advertising messages following sentence: "caution, borrowing money has also to be paid".

*"Dear Sir/Madam. The funds on your current account are insufficient to cover the cost of this transaction. If you wish to pursue your buying, be aware that besides a charge of x EUR, an interest rate of x percent will be due. Please press 1) CANCEL if you wish to refrain from the transaction of 2) OK if you wish to continue"*²³.

13. *Behaviour deviation (III): loss aversion* – In 1776 SMITH stated that *"the chance of gain is by every man more or less overvalued, and the chance of loss is by most men undervalued, and scarce by any man, who is in tolerable health and spirits, valued more than it is worth"*²⁴.

14. *Behaviour deviation (IV): mental accounting* – People divide their assets in different 'mental' accounts. One account is reserved for the education and training of children, another for retirement savings, yet another for the purchase of food and medicine. However, money is money. THALER found that consumers sometimes choose to buy a TV, a car, etc. on installments, while they still have sufficient money standing on their saving account. In the consumer's head these savings are, however, reserved for another purpose. This is no rational behaviour²⁵.

15. *Behaviour deviation (V): 'status quo'-bias* – Men like to stay with their initial choice. They fear that a change of mind/direction will deteriorate their position or their assets. A loss arising from an action outweighs any loss caused by an omission to take action²⁶. This behavioural deviation plays a role when reviewing credit agreements and/or choosing for an early repayment²⁷. One must admit that sometimes the information vis-à-vis early repayment and/or the revision of credit agreements is unclear or lacking²⁸.

16. *Lack of real choice* – Finally, the consumer does not always have a real choice when signing a credit agreement²⁹. This defect may arise from the financial need for money to buy certain goods or services. It may also be the result of a weaker negotiating position. Indeed, it

²³ M. DE MUYNCK, "Credit Cards, Overdraft Facilities and European Consumer Protection. A Blank Cheque for Unfairness?", *ERPL* 2010, 1228.

Cf. also the warning that the lender, pursuant to art. 11 WCK, should include in the Standard European Consumer Credit Information form on *"Missing payments could have severe consequences for you (e.g. forced sale) and make obtaining credit more difficult."* Cf. Annex I to the WCK.

²⁴ A. SMITH, *An inquiry into the Nature and Causes of the Wealth of Nations*, London, W. Strahan and T. Cadell, 1776, 107.

²⁵ R. THALER, "Mental Accounting and Consumer Choice", *Marketing Science* 1985, 199-200.

²⁶ W. SAMUELSON and R. ZECKHAUSER, "Status Quo Bias in Decision Making", *Journal of Risk and Uncertainty* 1988, 38.

²⁷ H. SHUI and L. AUSUBEL, *Time Inconsistency in the Credit Card Market*, <http://ssrn.com/abstract=586622>, 2004, 50p., showing that consumers of their own will not often change from lender.

²⁸ J.P. ABRAHAM, "La formation des taux d'intérêt en Belgique. Le point de vue économique", *T.Vred.* 1995, 1995, 63; L. COPPENS, "Gevangen in je woonkrediet", *De Standaard August* 20, 2011.

²⁹ TH. WILSON, N. HOWELL and G. SHEEHAN, "Protecting the Most Vulnerable in Consumer Credit Transactions", *JconsP* 2009, 120-125.

Cf. BIS, "A Better Deal for Consumers. Economic Narrative", <http://www.bis.gov.uk/files/file52074.pdf>, 2009, 3 and 5-8.

is often difficult for a consumer to negotiate in full equality the terms and conditions of the credit agreement³⁰.

17. *The creditor's reputation as a solution?* – Imperfect information does not necessarily lead to inefficient results. A creditor abusing the consumer's information asymmetry to achieve higher profits may suffer reputational damage in the long run³¹. However, the competition on the credit market is sometimes biased. Credit agreements are sometimes tailor-made, i.e. it takes into account the creditworthiness of that specific consumer³². It is thus difficult for consumers to share their experiences with certain creditors³³. Difficult, but not impossible though. It just takes longer to expose the bad reputation of a particular creditor³⁴. But the risk of reputational damage alone seems inadequate and/or insufficient to protect consumers in the field of consumer credit. Nonetheless, initiatives to introduce the creditor's reputation as a method of consumer protection are always welcome. The Belgian government recently wants to condemn financial institutions that repeatedly offer risky investments to their clients to higher penalties. The penalty can also be made public, so that the financial institution could suffer reputational damage³⁵.

B. Solutions through legislation

18. *Need for rules* – We can conclude that the market mechanism insufficiently provides (objective) information to the consumer. Thus, the legislator should intervene. He may impose information requirements to the creditor. Examples range from merely handing over information brochures to providing personal advice. The manner in which information is transmitted also plays an important role. One can also tackle the problem preventatively by

³⁰ J. DREXL, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, Tübingen, Mohr Siebeck, 1998, 329; V. ROPPO, "From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?", *ERCL* 2009, 332; TH. WILSON, N. HOWELL and G. SHEEHAN, "Protecting the Most Vulnerable in Consumer Credit Transactions", *JconsP* 2009, 120-125.

³¹ V.P. GOLDBERG, "Institutional Change and the Quasi-Invisible Hand", *Journal of Law and Economics* 1974, 486; A. GRIFFITHS, "Brands, business and social responsibility" in M. FAURE and F. STEPHEN (eds.), *Essays in the Law and Economics of Regulation. In Honour of Anthony Ogus*, Antwerp/Oxford/Portland, Intersentia, 2008, 204; L. KAPLOW and S. SHAVELL, "Fairness versus welfare", *Harv. L. Rev.* 2001, 1157-1162; I. RAMSAY, "Regulation of consumer credit" in G. HOWELLS, I. RAMSAY, T. WILHELMSSON and D. KRAFT (eds.), *Handbook of research on international consumer law*, Cheltenham, Edward Elgar, 2010, 387.

Cf. for investment products, current and savings accounts, a recent study indicates that a bank best positions itself as a trusted contract counterpart which guarantees proper and correct information. Cf. W. SINN, D. VATER, D. LUBIG and M. KASCH, *Was Bankkunden wirklich wollen*, München/Zürich, Bain & Company Germany/Switzerland Inc., 2012, 23.

³² O. BAR-GILL and E. WARREN, "Making Credit Safer", *U. Pa. L. Rev.* 2008, 122.

Or as COASE put it: "Nothing could be more diverse than the actual transactions which take place in our modern world". Cf. R.H. COASE, "The Nature of the Firm", *Economica* 1937, 396.

³³ Cf. for example concerning the obscurity of rates for home loans: J.P. ABRAHAM, "La formation des taux d'intérêt en Belgique. Le point de vue économique", *T.Vred.* 1995, 1995, 63; L. COPPENS, "Woonkrediet wordt valstrik", *De Standaard* July 8, 2011; concerning the lack of clarity of bank tariffs: IP/10/1369 [Investments, real estate and internet access: examples of inadequate consumer markets].

³⁴ Mouth-to-mouth advertising about a cheap and correct seller of household appliances or *vice versa* comments on a bad one will lead much faster to the build up or respectively the deterioration of a reputation.

³⁵ N. TANGHE, "Regering voert schandpaal in voor banken", *De Standaard* February 15, 2013.

offering financial education. This formation is independent of a specific loan request. The purpose is to give every man the possibility to acquire a basic understanding of economic and legal concepts and of financial services.

1. Information requirements

19. *Information and advice requirements* – We limit ourselves below to a discussion of the information and advice requirements³⁶ in European consumer (credit) law *sensu stricto*³⁷, since the information requirements were fully harmonised by the European legislator.

Below three types of information requirements are mentioned. More specifically, the rules on (i) advertising, (ii) pre- and (iii) contractual information.

20. *Advertising* – Commercials are a first introduction to a credit agreement. The creditor wants to praise its credit agreement and its indispensability as good as possible. Correct advertising is thus important. Directive 2005/29/EC protects consumers in general terms against misleading and unfair commercial practices, including advertising^{38,39}. Article 4 Directive 2008/48/EC contains some standard clauses that a creditor must include in its advertising. The information must state "*in a clear, concise and prominent way by means of a representative example*" the basic contractual terms of the credit agreement. This includes a.o. information on the borrowing rate, the total amount of credit, the annual percentage rate, the duration of the credit agreement, the default interest rate, etc.⁴⁰. Creditors have to take into account both provisions⁴¹. In case of a conflict of law the principle "*lex specialis derogat legi*

³⁶ For the differences and similarities between an information and advice requirement: J. VORTMANN, *Aufklärungs- und Beratungspflichten der Banken*, Keulen, RWS Verlag Kommunikationsforum GmbH, 2009, 1-4.

³⁷ Cf. also the information requirements in Directive 2011/83/EU; Directive 2008/48/EC; Directive 2005/29/EC; Directive 2002/65/EC of the European Parliament and of the Council of September 23, 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, *Pb.L.* October 9, 2002, 16-24; Directive 2000/31 of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market, *Pb.L.* July 17, 2000, 1-16; Directive 98/6/EC of the European Parliament and of the Council of February 16, 1998 on consumer protection in the indication of prices or products offered to consumers, *Pb.L.* March 18, 1998, 27-31; Directive 94/47/EC of the European Parliament and of the Council of October 26, 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, *Pb.L.* October 29, 1994, 83-87; Directive 87/102/EEC; etc.

Also the proposals of the European Commission for new Directives start from information paradigm. Cf. a.o. COM(2011) 142 def. [Proposal for a Directive of the European Parliament and the Council on credit agreements relating to residential property].

³⁸ This prohibition of the diffusion of misleading information is a negative information requirement. There exist also positive disclosure requirements. A positive information requirement requires producers and suppliers of services to provide to the consumer the objective information needed so that he can close the agreement with knowledge. Cf. E. TERRY, *Bedenktijden in het consumentenrecht. Het herroepingsrecht als instrument van consumentenbescherming*, Antwerp-Oxford, Intersentia, 2008, 34-35; T. VAN DYCK and V. COLAERT, "Reclameregulering als vorm van consumentenbescherming" in C. BRUYNEEL, J.P. BUYLE, M. DELIERNEUX, J.F. ROMAIN and E. VAN DEN HAUTE (eds.), *Liber Amicorum A. Bruyneel*, Brussels, Larcier, 2008, 35-36.

³⁹ Moreover art. 3 (9) Directive 2005/29/EC allows Member States to introduce more stringent provisions for "financial services as indicated in Directive 2002/65/EC and immovable goods".

⁴⁰ Art. 4 (2) Directive 2008/48/EC.

⁴¹ Art. 4 (4) Directive 2008/48/EC.

generali" applies. Unfortunately, the European legislator did not adopt a general framework on advertisements for credit agreements. The information requirements only apply if the advertisements mention the cost of credit⁴². The national legislator can oblige creditors to include standard information in any advertising for a consumer credit agreement *sensu stricto*⁴³.

21. *Pre-contractual information* – The creditor shall also inform the consumer during the contract negotiations that lead to the signing of the credit agreement⁴⁴. The creditor shall provide the information on the basis of an European Standard Form, which is included in Annex II to Directive 2008/48/EC⁴⁵. If the creditor has given this form to the consumer, he is presumed to have met his information obligation⁴⁶. It is a rebuttable presumption⁴⁷. Furthermore, the creditor shall provide the consumer with the standard form and a free copy of the credit agreement in due course before the credit agreement⁴⁸.

The consumer should also have sufficient time to reflect and overlook his options⁴⁹. The consumer shall receive the necessary information in good time before signing the credit agreement in order to reflect quietly whether or not the credit agreement offered to him best suits his needs and capabilities⁵⁰. Directive 2008/48/EC does not define the term 'good time'. The creditor and, in case of dispute, the court must have to interpret the concept of a 'good time' *in concreto*⁵¹. Such an open standard has advantages and disadvantages. On one hand it

⁴² In an earlier phase, it was possible to deduct a comprehensive framework for advertising from the wording of COM (2004) 747 final. [Amended proposal for a Directive of the European Parliament and the Council on the harmonisation of laws, regulations and administrative provisions of the Member States concerning consumer credit, repealing Directive 87/102/EEC and amending Directive 93/13/EEC], 5 -6, Eq. Recital 18 *in fine* Directive 2008/48/EC, see also V. COLAERT and E. TERRYIN, "Kredietpromotie" in E. TERRYIN (ed.), *Handboek Consumentenkrediet*, Bruges, Die Keure, 2007, 66-70.

⁴³ Consideration 9, 10 and 18 and *in fine* art. 22 (1) Directive 2008/48/EC; E. TERRYIN and J. VANNEROM, "De nieuwe richtlijn consumentenkrediet en de implicaties voor de Belgische wetgeving" in VRG-Alumni (ed.), *Recht in beweging – 16de VRG Alumnidag*, Antwerp, Maklu, 2009, 30-31.

⁴⁴ Also, the credit intermediary is subject to these pre-contractual information requirements (art. 5 (1) Directive 2008/48/EC. Pursuant to art. 7 Directive 2008/48/EC are "*suppliers of goods or providers of services which ancillary act as credit intermediaries*" exempted from these pre-contractual information requirements.

⁴⁵ There apply additional or specific information requirements for credit agreements in the form of an authorised overdraft on an account and for certain specific credit agreements (art. 6 Directive 2008/48/EC). The information requirements are more limited in case of communication via speech recognition (art. 5 (2) Directive 2008/48/EC)

⁴⁶ Art. 5 (1) *in fine* Directive 2008/48/EC.

⁴⁷ Cf. also the prejudicial question of the Tribunal d'instance d'Orléans of May 30, 2013 in the case ECJ C-298/13, *Facet SA and BNP Paribas Personal Finance SA v. Saïda Bouchelaghem a.o.*

⁴⁸ If the lender has decided at the time of the request not to grant a credit to the consumer, then he may refuse to issue a draft credit agreement free of charge (art. 5(4) *in fine* Directive 2008/4).

⁴⁹ At this stage we do not yet discuss about a cooling off period *sensu stricto*. TERRYIN defines the cooling off period *sensu stricto* as "*de afkoelmogelijkheid na de totstandkoming van een zekere wilsovereenstemming, ongeacht of de overeenkomst nu als 'voorlopig' of 'definitief' gesloten moet worden beschouwd*". Cf. E. TERRYIN, *Bedenk tijden in het consumentenrecht. Het herroepingsrecht als instrument van consumentenbescherming*, Antwerp-Oxford, Intersentia, 2008, 22

⁵⁰ Art. 5 (1) Directive 2008/48/EC.

provides flexibility for the contracting parties. On the other hand it leads to legal uncertainty. Ideally, the preparatory work had given an indication and/or criteria.

22. *Appropriate explanation* – The creditor must in some cases give the consumer an appropriate explanation about the credit agreement⁵². This appropriate explanation is not an abstract concept, but should always be assessed *in concreto*⁵³. It must allow the consumer to give his informed consent⁵⁴. Thus the consumer must be informed about (i) the content and characteristics of the credit agreement and (ii) the utility and the purpose for which such type of credit agreement is normally used⁵⁵. The creditor's explanation shall take into account (i) the repayment ability of the consumer, (ii) the risk, (iii) whether or not there is a fixed timetable, (iv) the ways of drawdown, and (v) the purpose of the requested credit⁵⁶. The proposal of the European Commission in 2002 went even further. Creditors were required to request collateral and to grant an appropriate credit⁵⁷. However, at the end of the legislative process the European legislator laid the final decision making power with the consumer.

23. *Contractual information* – The third and final part of the information requirements concern the information that the lender must provide in the credit agreement itself⁵⁸. The credit agreement must list the basic terms and conditions.

The creditor must also communicate any change in the borrowing rate to the consumer during the execution of the contract. The notification should be made before the new borrowing rate is applied⁵⁹. The creditor may also provide this information to the consumer periodically. This possibility should be stipulated in the loan agreement. Moreover, the new borrowing rate

⁵¹ Cf. to make general conditions ("*Allgemeine Geschäftsbedingungen*") opposable under German law, § 305(2) BGB requires that "*wenn der Verwender bei Vertragsschluss [...] 2. der anderen Vertragspartei die Möglichkeit verschafft, in zumutbarer Weise, die auch eine für den Verwender erkennbare körperliche Behinderung der anderen Vertragspartei angemessen berücksichtigt, von ihrem Inhalt Kenntnis zu nehmen*". Cf. also T. WILHELMSSON and C. WILLET, "Unfair terms and standard form contracts" in G. HOWELLS, I. RAMSAY, T. WILHELMSSON and D. KRAFT (eds.), *Handbook of research on international consumer law*, Cheltenham, Edward Elgar, 2010, 170.

⁵² J. VORTMANN, *Aufklärungs- und Beratungspflichten der Banken*, Keulen, RWS Verlag Kommunikationsforum GmbH, 2009, 2.

⁵³ E. TERRYIN and J. VANNEROM, "De nieuwe richtlijn consumentenkrediet en de implicaties voor de Belgische wetgeving" in VRG-Alumni (ed.), *Recht in beweging – 16de VRG Alumnidag*, Antwerp, Maklu, 2009, 33-34.

⁵⁴ Art. 5 (6) Directive 2008/48/EC states that " *that creditors [...] provide adequate explanations to the consumer, in order to place the consumer in a position enabling him to assess whether the proposed credit agreement adapted to his needs and to his financial situation*" (own emphasis added). Cf. also consideration 27 Directive 2008/48/EC.

⁵⁵ O. BAR-GILL, "The Behavioral Economics of Consumer Contracts" in O. BAR-GILL and R. EPSTEIN, *Consumer Contracts: Behavioral Economics vs. Neoclassical Economics. An exchange between Oren Bar-Gill and Richard A. Epstein*, <http://ssrn.com/abstract=982527>, New York University School of Law, 2007, 38.

⁵⁶ COM(2002) 443 final, 14; cf. also art. 6 (2) COM(2002) 443 final, 38.

⁵⁷ Art. 10 (2) Directive 2008/48/EG; C. HERRESTHAL, "Die Verpflichtung zur Bewertung der Kreditwürdigkeit und zur angemessenen Erläuterung nach der neuen Verbraucherkreditrichtlinie 2008/48/EG", *WM* 2009, 1177-1179.

⁵⁸ Art. 10 (5) and 12 Directive 2008/48/EC contain specific regulations for credit agreements in the form of authorised overdrafts on an account.

⁵⁹ Art. 11 (1) Directive 2008/48/EC.

should be the result of a change in a reference rate, of which consumers can take note appropriately and which can be consulted in the offices of the creditor⁶⁰.

2. Financial education

24. *Some recent initiatives* – A final way to inform the consumer is by giving financial education. The OECD and the World Bank published hereabout some recommendations⁶¹. Number of initiatives are launched within the EU⁶². In Belgium schools already offered lessons on economics, money management...⁶³. From 2014 economics will become a mandatory course in schools for secondary education⁶⁴.

Furthermore, the European Commission aims to boost the quality of financial education. While this is, according to the Commission, is essentially the responsibility of the Member States, the Commission proposes some possible action plans to install a better financial basic knowledge of consumers. This may include:

- financing existing projects. The European Commission has already contributed in the past to support some projects⁶⁵;
- developing guidelines;
- identifying and promoting best practices;
- drafting innovative proposals⁶⁶.

⁶⁰ Art. 11 (2) Directive 2008/48/EC.

⁶¹ OECD, "Recommendation of the Council on Good Practices on Financial Education and Awareness Relating to Credit", 2009, <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=78&Lang=en&Book=False>; OECD, "Recommendation on Principles and Good Practices for Financial Education and Awareness", 2005, <http://www.oecd.org/finance/financial-education/35108560.pdf>, 7p.; WORLD BANK, "Good Practices for Financial Consumer Protection", 2012, <http://responsiblefinance.worldbank.org>, 102p.

⁶² Concerning European initiatives: EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY, "Report on Financial Literacy and Education. Initiatives by Competent Authorities", 2011, https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/reports/Report_on_Financial_Literacy_and_Education_EIOPA-CCPFI-11-018_.pdf, 38p.

An information site for consumers exists in France and in the United Kingdom: <http://www.lafinancepourtous.com> and <https://www.moneyadviceservice.org.uk>.

In Germany the Bankenverband (a German association representing the interests of private banks) Has started with some projects on financial education. For example Schul/Bank, an information platform for schools and teachers with information and teaching materials on economics and finance: www.schulbank.de.

Cf. concerning this matter S. DE BROUWER, "Financial Literacy in Europe" *Bank Fin.* 2011, 263-265; L. VAN CAUTER, "De bescherming van de financiële consument – Een overzicht van het regelgevend kader" in H. DAEMS, I. DE MEULENEERE, R. FELTKAMP, C. HOUSSA and R. STEENNOT (eds.), *Bescherming van de consument in het financieel recht. La protection du consommateur en droit financier*, Limal/Antwerp-Oxford, Anthemis/Intersentia, 2012, 31-32.

⁶³ For a brief overview of existing Belgian information programs: CBFA, *Verslag over het bevorderen van de financiële kennis in België*, http://www.cbfa.be/nl/consultations/lop/pdf/2008-10_promotion.pdf, 2008, 18-22.

⁶⁴ C. DE HERDT, "Economie wordt verplicht schoolvak", *De Standaard* October 11, 2011.

Cf. also the call of the Vlaamse Juristenvereniging for a debate on juridical literacy (B. DE GROOTE, "Geen juridische geletterdheid zonder toegang tot juridische basisinformatie", *RW* 2010-11, 302)

⁶⁵ For example: the online information platform Dolceta (<http://www.dolceta.eu/>).

25. *The purpose of education is fuelling financial capability* – Financial education should lead to financially capable consumers, which can process the information obtained and actually implement it in their everyday lives⁶⁷. The term 'financial capability' includes more than the term 'financial knowledge'. It means that the consumer:

- has the necessary financial knowledge;
- adopts an attitude reflecting his financial knowledge; and
- also acts/behaves in a manner that is consistent with the financial knowledge he claims to possess⁶⁸.

Mandatory financial information alone is not sufficient. Financial education should ensure that consumers ultimately act consistently⁶⁹.

26. *Target group of financial education* – According to the European Commission, it is best to start as soon as possible with financial education⁷⁰. A Dutch study shows that a large majority of young people feel that schools have a role to play alongside the parents^{71, 72}.

§3. Multi-layered consumer image

27. *Information is good, but not always sufficient* – Legislators are *de lege lata* in favour of the information paradigm. We have shown that the information paradigm alone falls short as a method of consumer protection⁷³. Firstly, more information means in principle more

⁶⁶ COM(2007) 226 def. [Green paper on Retail Financial Services for Consumers in the Single Market], 18-19; cf. also S. DE BROUWER, "Financial Literacy in Europe" *Bank Fin.* 2011, 261-263.

⁶⁷ Y.M. ATAMER, "Duty of Responsible Lending: Should the European Union Take Action?" in S. GRUNDMANN and Y.M. ATAMER (eds.), *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting*, Kluwer Law International, Alphen a/d Rijn, 2011, 188-189; L. VAN CAUTER, "De bescherming van de financiële consument – Een overzicht van het regelgevend kader" in H. DAEMS, I. DE MEULENEERE, R. FELTKAMP, C. HOUSSA and R. STEENNOT (eds.), *Bescherming van de consument in het financieel recht. La protection du consommateur en droit financier*, Limal/Antwerp-Oxford, Anthemis/Intersentia, 2012, 31; T. VAN DYCK, *De geharmoniseerde prospectusplicht. Kritische analyse van de geharmoniseerde prospectusplicht in de Prospectusrichtlijn 2003/71/EG en haar omzettingen in België, Nederland, Frankrijk, het Verenigd Koninkrijk en Duitsland*, Bruylot, 2010, 85.

⁶⁸ A. ATKINSON, S. MCKAY, E. KEMPSON and S. COLLARD, *Levels of financial capability in the UK: results of a baseline survey*, <http://www.fsa.gov.uk/pubs/consumer-research/crpr47.pdf>, 2006, 10-11; D. LOERWALD, "How can we measure financial literacy", abstract written following an oral presentation during the Workshop "Are we Financially Illiterate? - Evaluation of knowledge and capabilities?" on the Internationale Konferenz zu Finanzdienstleistungen, *Finanzdienstleister und Verbraucherschutz - zwei Welten?*, Konferenz Reader, 2010, 38.

⁶⁹ D. DE MEZA, B. IRLBUSCH and D. REYNIERS, *Financial Capability: A Behavioural Economics Perspective*, <http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf>, 2008, 2-4.

⁷⁰ COM(2007) 808 [Communication of the Commission – Financial education], 7-9.

⁷¹ NIBUD in cooperation with CENTIQ, "Financiële opvoeding 2010", NIBUD, 2010, 8p.

⁷² The Specific Teacher Training of Commercial Sciences at Hogeschool Gent started in 2010 with a project on "financial literacy". The purpose of the project is the elaborating of lessons for secondary education.

The European Economic and Social Committee also argues for the inclusion of financial education in the curricula of the schools. Cf. CES/11/82 of July 14, 2011, www.eesc.europa.eu; ECO/297, "Opinion of July 14, 2011 of the European Economic and Social Committee on Financial education and responsible consumption of financial products (own-initiative opinion)", <http://www.eesc.europa.eu/?i=portal.en.eco-opinions.15375>, 2 en 4-6.

responsibility for the consumer on the choices made by him⁷⁴. If one does not accept this, one has to deal with (a hidden form) of paternalism. Secondly, the functioning of the market alone will not lead to sufficient and correct information. Thus the legislator had to intervene to safeguard the (substantive) freedom of contract. Here, however, one took too little account of the various market distortions.

This paper does not plead to throw everything overboard. No, mandatory information disclosure can be useful, but perhaps combined with other methods of consumer protection.

28. *Overview of difficulties* – Looking for other methods of consumer protection, some questions and comments arise. Firstly, we note that the current definition of the consumer notion is still under discussion. Some legislative texts define the consumer as a natural person who acquires or uses products/services principally for non-professional purposes. Other legislation applies a more restrictive view of the non-professional nature. The consumer is a natural person acting exclusively for non-commercial purposes. The legal doctrine and justice is divided on this point⁷⁵.

Secondly, limiting the scope of application *ratione personae* of consumer law using the current consumer notion is not unproblematic. The majority assumes that the purpose of the consumer law is to protect the consumer against a stronger negotiating party. Recently, however, the question is whether one should not abandon a person-oriented view of the consumer and focus more on the interrelationship of the contracting parties. Consumer law should not protect only consumers but each party who is in a weaker bargaining position in a specific contractual relationship. One may wonder whether the definition of consumer credit should not be extended to small and medium sized enterprises (SMEs). In principle one abolishes in this way consumer law *sensu stricto*. Only the consumer law *sensu lato* which aims to protect the weaker party against market failures subsists.

Finally, we note that the consumer image is two-fold and that it has its shortcomings. The reference point is the average-informed and reasonably observant and circumspect consumer, who is able to take a rational decision provided he obtained sufficient and correct information. This forms the basis for the assessment of the legislative and judicial action in a situation-specific consumer law. Legal rules are not written tailor-made to each specific, individual consumer, but are drafted in accordance to the image of an abstract, average consumer. After the legislator and/or the judge have/has investigated the circumstances under which the average consumer suffers from market failures - and thus encounters disadvantages of his weaker bargaining position - they seek to restore the market failure as optimal as possible⁷⁶. This is a correct, but insufficient working hypothesis.

A. Consumer Image and the Court of Justice

29. *Double consumer image* – In the jurisprudence of the Court of Justice a double consumer image emerges. As we shall see below, the Court of Justice takes the image of the average informed consumer as the starting point in its jurisprudence on primary European

⁷⁵ For an overview: see a.o. J. VANNEROM, "Consumer Notion: Natural or Legal Persons and Mixed Contracts" in E. TERRY, G. STRAETMANS and V. COLAERT (eds.), *Landmark Cases of EU Consumer Law. In Honour of Jules Stuyck*, Cambridge-Antwerp-Portland, Intersentia, 2013, 53-72.

⁷⁶ For England: CROWTHER COMMITTEE, *Consumer Credit. Report of the Committee*, I, Report, London, HM Stationery Office, Cmnd 4596, 1971, 151-153.

Union law or on unfair commercial practices. In its jurisprudence on unfair terms the Court of Justice emphasizes the weaker bargaining position of consumers. As such the Court of Justice authorise a more far-reaching interference by the legislator and the national judges in the contractual relationship between the consumer and the trader.

1. *The consumer in the internal market and the law on commercial practices*

30. *Development of the consumer image in the internal market* – The primary European Union law regulates the functioning of the European Union and its internal market. It guarantees freedom of goods, persons, services and capital⁷⁷. Member States may not impose quantitative import and export restrictions impeding intra-EU-trade⁷⁸. Such national restrictions can be challenged before the Court of Justice. We speak about negative harmonisation. Indeed, here the European legislator does not actively regulate a particular product, service or sales method. The Court of Justice provides for an integrated internal market by eliminating national protectionist rules⁷⁹. Consumer protection is often cited as a justification for such national restrictions. However, the Court of Justice inveighed against purely protectionist provisions enacted under the guise of consumer protection, but merely aimed to protect the national market. The judgment in *Rewe-Zentral* about the French liqueur *Cassis de Dijon* is probably the best known⁸⁰. There were also a number of Belgian cases⁸¹. In reviewing national restrictions, the Court of Justice had to define who the consumer is or better what degree of protection he needs. The European consumer image is so largely developed by the jurisprudence of the Court of Justice on the freedom of goods and services.

31. *Jurisprudential evolution* – The jurisprudential development started with a judgment of the Court of Justice of February 20, 1979⁸². In a case concerning the free movement of goods *Rewe-Zentral AG* asked to the '*Bundesmonopolverwaltung für Branntwein*' an authorisation for the import of the spirit '*Cassis de Dijon*' on the German market. A permit was not necessary according to the *Bundesmonopolverwaltung*. However it was not to be imported, as suppliers might only introduce on the market drinks with an alcohol content of at least 32%. The ban of import intended a.o. to protect the consumer against false assumptions about the

⁷⁷ Resp. art. 28; 45 and 49; 56; 63 VWEU.

⁷⁸ Art. 34-35 VWEU.

⁷⁹ J. GODDAER, E. TERRYIN and J. VANNEROM, "Invloed van het Europese recht op het consumenten(contracten)recht" in I. SAMOY, V. SAGAERT and E. TERRYIN (eds.), *Invloed van het Europese recht op het Belgische privaatrecht*, Antwerp-Cambridge, Intersentia, 2012, 473-478; I. RAMSAY, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets. Third Edition*, Oxford, Hart, 2012, 30-33.

⁸⁰ ECJ 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*.

⁸¹ Cf. a.o. ECJ C-205/07, *Criminal proceedings v. Lodewijk Gysbrechts and Santurel Inter BVBA*; ECJ C-20/03, *Criminal proceedings v. Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong*; ECJ C-239/02, *Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis and Douwe Egberts NV v. FICS-World BVBA*; ECJ C-50/85, *Berhard Schloh v. PVBA Auto contrôle technique*; ECJ C-261/81, *Walter Rau Lebensmittelwerke v. De Smedt PVBA*.

For a detailed discussion: J. GODDAER, E. TERRYIN and J. VANNEROM, "Invloed van het Europese recht op het consumenten(contracten)recht" in I. SAMOY, V. SAGAERT and E. TERRYIN (eds.), *Invloed van het Europese recht op het Belgische privaatrecht*, Antwerp-Cambridge, Intersentia, 2012, 474-478.

⁸² S. GRUNDMANN and Y.M. ATAMER, "European Contract Law and Banking Contracts after the Financial Crisis: Challenges for Contracting and Market Transactions" in S. GRUNDMANN and Y.M. ATAMER (eds.), *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting*, Kluwer Law International, Alphen a/d Rijn, 2011, 16.

consumed beverage. Rewe-Zentral appealed the decision. Ultimately the case came before the Court of Justice. The Court of Justice ruled that the information about the origin of the drink and the alcohol content⁸³ was a less far-reaching restriction on cross-border trade than the imposition of a minimum alcohol content. The information paradigm as a means of consumer protection was born.

Also in the case, *the European Commission against Germany*, the Court of Justice confirmed that the mandatory information disclosure to consumers is preferred above a ban on imports of products from other Member States. The German '*Reinheitsgebot*' states that only beverages made from malted barley, hops, yeast and water may be traded as beer in Germany. The beer import from another Member State did not comply with this requirement. The Court of Justice preferred again mandatory information requirements over a ban. It is sufficient for a trader to notify the consumer that the beer, which he is to purchase does not meet the German '*Reinheitsgebot*', for example. The consumer can then with full knowledge make his choice⁸⁴.

The Court of Justice confirmed this view on the quest of the consumer to the '*characteristics*' of a product in the *Pall v. Dahlhausen* judgment and continues to repeat it in subsequent judgments on the free movement of goods and services⁸⁵. Some two years before the *Pall v. Dahlhausen* judgment the Court of Justice even ruled that each consumer has a right on information in the *GB Inno* case⁸⁶.

32. *Basic knowledge of the average consumer* – In the jurisprudence on the internal market and on misleading and unfair commercial practices the Court of Justice takes the average consumer as the standard for information disclosure⁸⁷. In the *Van Bennekom* case the Court of Justice indicated for the first time what basic level of knowledge one can expect from the consumer. The consumer who evaluates medicinal products has an average discernment⁸⁸. The Court of Justice refined this consumer image and speaks about the "*average consumer who is reasonably well informed and reasonably observant and circumspect*"⁸⁹. The national

⁸³ Consideration 14 ECJ 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*; cf. also consideration 25 Concl. N. FENNELY ECJ C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*.

⁸⁴ Consideration 35 and 36 ECJ 178/84, *Commission v. Germany (Reinheitsgebot)*.

⁸⁵ Consideration 19 ECJ C-238/89, *Pall Corp. v. P.J. Dahlhausen & Co.*; cf. also consideration 24 ECJ C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln eV. v. Mars GmbH*; ECJ C-315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*; consideration 17 ECJ C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft eV. v. Yves Rocher GmbH*; consideration 15-17 ECJ C-373/90, *Nissan*.

⁸⁶ ECJ 362/88, *GB Inno SA v. Confédération du Commerce luxembourgeois ASBL*; L. GORMLEY, "The Consumer Acquis and the Internal Market", *EBLR* 2009, 417; J. STUYCK and G. STRAETMANS, *Financiële diensten en de consument. Bankdiensten - Consumentenkrediet - Hypothecair krediet - Verzekeringen - Handelspraktijken volgens het Belgisch en Europees recht*, Antwerp, Kluwer, 1994, 31-32; T. WILHELMSSON, G. HOWELLS and H.-W. MICKLITZ, "European Consumer Law" in M. BUSSANI and F. WERRO (eds.), *European Private Law: a Handbook*, Bern, Stämpfli, 2009, 270-271.

⁸⁷ R. INCARDONA and C. PONCIBÒ, "The average consumer, the unfair commercial practices directive, and the cognitive revolution", *JconsP* 2007, 24.

⁸⁸ Consideration 18 ECJ 227/82, *Criminal proceeding v. Leendert Van Bennekom*.

⁸⁹ Consideration 27 ECJ C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*; consideration 36 ECJ C-303/97, *Verbraucherschutzverein eV v. Seckellerei G.C. Kessler GmbH und Co*; consideration 31 ECJ C-210/96, *Gut Springenheide GmbH en Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt*; G. STRAETMANS, "Het Europese consumentenacquis: genese en toekomstblik" in J.

courts may in their review of misleading and unfair commercial practices assume that a consumer is able to estimate the value of standard information. Advocate General GEELHOED even believes that a consumer, before he (first) purchases a product or service, will always take knowledge of the information on the label⁹⁰. In the *Darbo* case also the Court of Justice held that the average informed and reasonable observant and circumspect consumer first looks at the list of ingredients. For example, if in this list the ingredient 'pectin' is mentioned, consumers can value the indication "*purely natural*" on the label. According to the Court of Justice, the labelling was not misleading⁹¹.

33. *The image of the 'searching informed consumer'* – The Court of Justice adopts in its jurisprudence on the internal market and on misleading and unfair commercial practices the image of the average informed and reasonable observant and circumspect consumer⁹². The consumer is actively seeking information. Once he has sufficient and correct information, he can make a free and conscious decision⁹³.

2. The consumer in case of positive harmonisation

34. *Ex officio review of unfair terms* – In the jurisprudence of the Court of Justice on unfair terms, however, a different consumer image emerges. The Court of Justice has repeatedly ruled that Directive 93/13/EEC misses its goal, if the consumer himself has to raise the unfairness of a contract term. The consumer is in fact in a weak bargaining position, partly because he has less information than the company⁹⁴. According to the Court of Justice article

MEEUSEN, G. STRAETMANS and A.-M. VAN DEN BOSSCHE (eds.), *Het EG-consumentenacquis: nu en straks*, Antwerp, Intersentia, 2009, 7-8.

⁹⁰ Consideration 54 Concl. L.A. GEELHOED by ECJ C-239/02, *Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis and Douwe Egberts NV v. FICS-World BVBA*.

This was already been mentioned. Cf. consideration 25 Concl. N. FENNELLY by ECJ C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*.

Cf. also R. INCARDONA and C. PONCIBÒ, "The average consumer, the unfair commercial practices directive, and the cognitive revolution", *JconsP* 2007, 30.

⁹¹ Consideration 20 ECJ C-465/98, *Verein gegen Unwesen in Handel und Gewerbe Köln eV v. Adorf Darbo AG*.

Cf. also consideration 12 ECJ 27/80, *Criminal proceeding v. Anton Adriaan Fietje* in which the Court stated that in some cases indications and signs are sufficient.

⁹² Consideration 27 ECJ C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*; consideration 36 ECJ C-303/97, *Verbraucherschutzverein eV v. Sektkellerei G.C. Kessler GmbH und Co*; consideration 31 ECJ C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt*.

⁹³ J. STUYCK and G. STRAETMANS, *Financiële diensten en de consument. Bankdiensten - Consumentenkrediet - Hypothecair krediet - Verzekeringen - Handelspraktijken volgens het Belgisch en Europees recht*, Antwerp, Kluwer, 1994, 31-32.

⁹⁴ Consideration 25-26 ECJ C-240/98-C-244/98, *Oceano Grupo Editorial SA v. Rocio Murciano Quintero*.

Cf. also consideration 41 ECJ C-618/10, *Banco Espanol de Credito SA v. Joaquin Calderon Camino*; consideration 48-49 ECJ C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*; consideration 31 ECJ C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*; consideration 26 and 38 ECJ C-168/05, *Elias Maria Mostaza Claro v. Centro Movil Milenium*; consideration 33 ECJ C-473/00, *Cofidis SA v. Jean-Louis Fredout*; I. DEMUYNCK, *De inhoudelijke controle van onrechtmatige bedingen: onderzoek van de Wet van 14 juli 1991 op de handelspraktijken en de voorlichting van de consument*, doctoraatsthesis UGent, 2000, 711; R. STEENNOT, "Sanctionering van inbreuken op het consumentenrecht: de zoektocht naar een rechtvaardige oplossing" in F. EVERS and P. LEFRANC (eds.), *Kiezen tussen recht en rechtvaardigheid*, Bruges, Die Keure, 2009, 147; A. VAN OEVELEN, "Enkele actuele knelpunten in het

6 of Directive 93/13/EEC aims to "replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them"⁹⁵. Therefore, the court must assess *ex officio* unfair terms. The *ex officio* assessment offers the consumer also a preventative protection against unfair terms. Traders will abstain from including unfair terms in the agreement. Indeed, the court has to declare the unfair contract term as not binding⁹⁶. When assessing out of its own motion unfair terms, the national court may not violate the right of defence, though. The Court of Justice extended this *ex officio* assessment of unfair terms to all types of consumer contracts. It is only required that the agreement falls *ratione materiae* and *personae* within the scope of Directive 93/13/EEC. Thus, the national court should also assess of its own motion interest clauses and clauses for non-performance in a consumer credit agreement⁹⁷. The Court of Justice also emphasized that a court must investigate *ex officio* whether a term falls within the scope of Directive 93/13/EEC⁹⁸. However, the scope of the judgment is not yet clear⁹⁹.

verbintenissenrecht", RW 2011-12, 56; C. WILLETT, *Fairness in consumer contracts: the case of unfair terms*, Aldershot, Ashgate, 2007, 99-101.

⁹⁵ Consideration 36 ECJ C-168/05, *Elias Maria Mostaza Claro v. Centro Movil Milenium*.

Cf. also consideration 45 ECJ C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*; consideration 20 ECJ C-472/11, *Banif Plus Bank Zrt v. Csaba Csipai and Viktoria Csipai*; consideration 40 ECJ C-618/10, *Banco Espanol de Credito SA v. Joaquin Calderon Camino*.

⁹⁶ Consideration 28 ECJ C-240/98-C-244/98, *Oceano Grupo Editorial SA v. Rocio Murciano Quintero*.

Cf. also consideration 41 ECJ C-76/10, *Pohotovost' s.r.o. v. Iveta Korckovska*; consideration 27 ECJ C-168/05, *Elias Maria Mostaza Claro v. Centro Movil Milenium*; consideration 32 ECJ C-473/00, *Cofidis SA v. Jean-Louis Fredout*; J. GODDAER, E. TERRYIN and J. VANNEROM, "Invloed van het Europese recht op het consumenten(contracten)recht" in I. SAMOY, V. SAGAERT and E. TERRYIN (eds.), *Invloed van het Europese recht op het Belgische privaatrecht*, Antwerp-Cambridge, Intersentia, 2012, 537.

Cf. consideration 32 ECJ C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi*; consideration 23 ECJ C-472/11, *Banif Plus Bank Zrt v. Csaba Csipai and Viktoria Csipai*; consideration 43 ECJ C-618/10, *Banco Espanol de Credito SA v. Joaquin Calderon Camino*.

⁹⁷ Consideration 61-63 ECJ C-429/05, *Max Rampion and Marie-Jeanne Godard v. Franfinance SA and K par K SAS*; consideration 32 ECJ C-473/00, *Cofidis SA v. Jean-Louis Fredout*; C. BIQUET-MATHIEU, "Les contrats du consommateur en Belgique" in X (ed.), *Travaux de l' Association Henri Capitant des amis de la culture juridique française*, LVII/2007, Brussels, Bruylant, 2010, 42.

Cf. also ECJ C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*; ECJ C-227/08, *Eva Martin Martin v. EDP Editores, SL*; prejudicial question of the Tribunal d'instance d'Orléans of May 30, 2013 in the case ECJ C-298/13, *Facet SA and BNP Paribas Personal Finance SA v. Saïda Bouchelaghem e.a.*; prejudicial question of Juzgado de Primera Instancia de Palma de Mallorca (Spain) of May 22, 2013 in the case C-280/13, *Barclays Bank S.A. v. Sara Sanchez Garcia en Alejandro Chacon Barrera*; prejudicial question of Juzgado de Primera Instancia de Palma de Mallorca (Spain) of March 11, 2013 in the case C-116/13, *Banco de Valencia SA v. Joaquin Valldeperas Tortosa en Maria Angeles Miret Jaume*.

Cf. Concl. N. WAHL by ECJ C-482/12, *Peter Macinsky and Eva Macinska v. Getfin s.r.o. and Financreal s.r.o.*

⁹⁸ Consideration 56 ECJ C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*.

Cf. in the *Pannon* case the Court of Justice ruled for the first time the national court has to investigate the unfair character of a contract term. However, the court had to rely on the factual and legal material given by the parties of the trial. Cf. consideration 32 ECJ C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi*.

⁹⁹ J. GODDAER, E. TERRYIN and J. VANNEROM, "Invloed van het Europese recht op het consumenten(contracten)recht" in I. SAMOY, V. SAGAERT and E. TERRYIN (eds.), *Invloed van het Europese recht op het Belgische privaatrecht*, Antwerp-Cambridge, Intersentia, 2012, 541.

35. *Ex officio review of remedies* – Recently, the Court of Justice in the *Duarte Hueros* case said that a court should raise *ex officio* the remedies granted by Directive 1999/44/EC¹⁰⁰, if the consumer in his initial claim can not specify himself his remedies or is not authorised to introduce a new procedure. The Court of Justice firstly points out the principle of procedural autonomy of the Member States¹⁰¹. National procedural rules must not violate the principle of effectiveness. They may not make the enforcement by the consumer of his rights under Directive 1999/44/EC extremely difficult or impossible¹⁰².

36. *Distance contracts* – The consumer image of the weaker contracting party does not only appear in the jurisprudence on unfair terms. The Court of Justice also cites other reasons for which the consumer is in a weaker bargaining position. For example, the consumer can be in a vulnerable position because the trader is looking for him at his home. In those cases, the Court of Justice put forward more stringent requirements on the protection of consumers, a.o. through stricter information requirements¹⁰³. In the *Buet* case representatives of SARL Educational Business Services visited consumers at their home and offered them English courses. The Court of Justice ruled that certain distance contracts put consumers in a particularly vulnerable position. *"The potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects"*¹⁰⁴.

37. *The image of the 'consumer in a weaker (bargaining) position'* – The Court of Justice uses a different consumer image in its jurisprudence on unfair terms and on the remedies which can be claimed under Directive 1999/44/EC. It is a consumer image which we also found in the jurisprudence on distance contracts. In these areas the Court of Justice is less reluctant to and accepts easier certain restrictions on the freedom of contract justified by the need for consumer protection. This enhanced protection is, according to the Court of Justice, justified because the consumer is in a weaker bargaining position. The consumer can not easily negotiate contractual terms¹⁰⁵. Often, the trader will submit its standard agreement for

¹⁰⁰ Directive 1999/44/EC of the European Parliament and the Council of May 25, 1999 on certain aspects of the sale of consumer goods, *Pb.L.* July 7, 1999, 12-16.

¹⁰¹ Consideration 31 ECJ C-32/12, *Soledad Duarte Hueros v. Autociba SA and Automoviles Citroën Espana SA*.

¹⁰² Considerations 39 and 41 ECJ C-32/12, *Soledad Duarte Hueros v. Autociba SA and Automoviles Citroën Espana SA*.

¹⁰³ ECJ C-382/87, *Criminal proceeding v. R. Buet and SARL Educational Business Services*; J. STUYCK and G. STRAETMANS, *Financiële diensten en de consument. Bankdiensten - Consumentenkrediet - Hypothecair krediet - Verzekeringen - Handelspraktijken volgens het Belgisch en Europees recht*, Antwerp, Kluwer, 1994, 31.

¹⁰⁴ Consideration 13 ECJ C-382/87, *Criminal proceeding v. R. Buet and SARL Educational Business Services*.
Contra: consideration 20 ECJ C-239/90, *SCP Boscher, Studer and Fromentin v. SA British Motors Wright and others*; J. STUYCK and G. STRAETMANS, *Financiële diensten en de consument. Bankdiensten - Consumentenkrediet - Hypothecair krediet - Verzekeringen - Handelspraktijken volgens het Belgisch en Europees recht*, Antwerp, Kluwer, 1994, 32. In the arrest *Boscher* the Court of Justice stated that obstacles to the free movement of goods are not allowed because the sales in question were directed to *"buyers who particularly wary."* They were, after all, specialised buyers. More importantly here is the observation that the judgment was about the single market, where The Court of Justice is more reticent.

¹⁰⁵ ECJ C-240/98-C-244/98, *Oceano Grupo Editorial SA v. Rocio Murciano Quintero*, where the Court of Justice is suggesting that *"system of protection elaborated by the Directive is based on the idea that the*

signature without the consumer being able to amend or negotiate certain terms¹⁰⁶. Moreover, the consumer can not always (fully) enforce his rights, because it is made extremely difficult or impossible by national procedural law¹⁰⁷.

3. Double consumer image

38. *Double consumer image: two criteria* – The consumer image can not be reduced to a homogeneous image. The Court of Justice uses in certain cases, the image of the 'searching informed consumer'. In other judgments it stresses the consumer's weaker bargaining position, who is not able to claim the rights he possesses out of his own motion. In the current legal doctrine one finds two criteria providing a possible explanation for the double consumer image.

39. *Specific circumstances as criterion* – STUYCK and STRAETMANS deduce from the jurisprudence of the Court of Justice a double consumer image¹⁰⁸. The Court of Justice starts, in principle, from a rational consumer who is looking for useful information and who, once he has the correct information, can make a free and informed decision¹⁰⁹. Opposite, stands the weak consumer or the consumer who is particularly vulnerable in certain situations¹¹⁰.

consumer is against the seller in a weak bargaining position and has less information than the latter" (consideration 25).

Cf. also consideration 46 ECJ C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*; consideration 29 ECJ C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*; consideration 25 ECJ C-168/05, *Elias Maria Mostaza Claro v. Centro Movil Milenium*; J. STUYCK, "Consumentenbescherming in tijden van economische crisis", *Jura Falc.* 2009-2010, 328.

¹⁰⁶ Consideration 46 ECJ C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*; consideration 29 ECJ C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*; consideration 25 ECJ C-168/05, *Elias Maria Mostaza Claro v. Centro Movil Milenium*; J. RINKES, "De consument als zwakke partij", *Ars Aequi* 2009, 381-382; E. SWAENEPOEL, *Toetsing van het contractueel evenwicht*, Antwerp-Cambridge, Intersentia, 2011, 24-25.

¹⁰⁷ ECJ C-32/12, *Soledad Duarte Hueros v. Autociba SA and Automoviles Citroën Espana SA*.

¹⁰⁸ G. STRAETMANS, "Some thoughts on the future European consumer acquis", *EBLR* 2009, 429; G. STRAETMANS, "Het Europese consumentenacquis: genese en toekomstblik" in J. MEEUSEN, G. STRAETMANS and A.-M. VAN DEN BOSSCHE (eds.), *Het EG-consumentenacquis: nu en straks*, Antwerp, Intersentia, 2009, 8; J. STUYCK and G. STRAETMANS, *Financiële diensten en de consument. Bankdiensten - Consumentenkrediet - Hypothecair krediet - Verzekeringen - Handelspraktijken volgens het Belgisch en Europees recht*, Antwerp, Kluwer, 1994, 30 and 272-273.

Cf. also P. ROTT, "'Responsible lending' – Vorsorge statt Nachsorge?" in G.M. PEER (ed.), *Die soziale Dimension des Zivilrechts – Zivilrecht zwischen Liberalismus und sozialer Verantwortung: Salzburger Tagung 10. bis 13. Sept. 2003*, Munich, Boorberg, 2004, 181-182.

¹⁰⁹ Examples: ECJ C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt*; ECJ C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft eV. v. Yves Rocher GmbH*; ECJ C-238/89, *Pall Corp. v. P.J. Dahlhausen & Co.*; ECJ 362/88, *GB Inno SA v. Confédération du Commerce luxembourgeois ASBL*; ECJ 178/84, *Commissie v. Bondsrepubliek Duitsland (Reinheitsgebot)*.

¹¹⁰ Example: ECJ 382/87, *Criminal proceeding v. R. Buët and SARL Educational Business Services*; J. STUYCK and G. STRAETMANS, *Financiële diensten en de consument. Bankdiensten - Consumentenkrediet - Hypothecair krediet - Verzekeringen - Handelspraktijken volgens het Belgisch en Europees recht*, Antwerp, Kluwer, 1994, 39.

40. *Harmonisation method as criterion* – UNBERATH and JOHNSTON link the rationale of the double consumer image to the chosen harmonisation method¹¹¹. In case of negative harmonisation they see a certain reluctance of the Court of Justice to accept national restrictions on fundamental freedoms. On the contrary, when positive harmonisation is at hand, the Court of Justice gives a broader significance and interpretation to (the protection of the consumer in) the European directives. They conclude that the consumer image in negative harmonisation is more limited than in positive harmonisation¹¹². Some authors stress, though, European consumer law in practice is not as black or white as this criterion might suggest this split. Indeed, the Court of Justice does not always give a broad interpretation to European directives¹¹³.

§4. Proposal for a multi-layered consumer image

A. Notion of the 'Multi-Layered Consumer'

41. *Going further...* – To get out of this impasse, there are *grosso modo* two options¹¹⁴. We can either join one (majority) group or depart from it and propose our own working hypothesis. As the title of this number suggests, we choose the latter option. This does not mean that we reject the current consumer notion and image. They have their merits and are still the reference point for the current legislation, doctrine and jurisprudence. We would like to build further on it. The truth lies indeed somewhere in the middle.

42. *Consumer Notion* – Firstly, we want to address shortly the consumer notion. We prefer to limit the consumer notion to any natural person acting primarily for non-business purposes. Thus we use the traditional consumer notion, but we do not follow its restrictive interpretation. In addition, we keep the policy choice open to provide in certain situations a similar protection to other weaker contracting parties, such as SMEs.

43. *Our proposal: the 'multi-layered consumer'* – Our proposed consumer image is somewhat innovative. Starting from the situation-specific nature of consumer law, it seems logical that the consumer image may change in function of specific situations in which the consumer finds himself. For some consumers it is sufficient to provide information, for others the way the information is received is equally important, while for some other consumers it is necessary for the legislator to intervene in the substantive contract equilibrium between the rights and obligations of the contracting parties resulting from the (credit) agreement. It is also of great importance to define the situations in which we will apply our model. This study does not claim that the model should be used as a working hypothesis and the basis for all legal rules on consumer (contracts). According to us, it may offer advantages in consumer

¹¹¹ H. UNBERATH and A. JOHNSTON, "The Double-Headed Approach of the ECJ concerning Consumer Protection", *CMLR* 2007, 1281.

¹¹² H. UNBERATH and A. JOHNSTON, "The Double-Headed Approach of the ECJ concerning Consumer Protection", *CMLR* 2007, 1281-1282.

¹¹³ J. STUYCK, "Setting the scene" in H.-W. MICKLITZ, J. STUYCK, E. TERRY and D. DROSHOUT (eds.), *Cases, Materials and Text on Consumer Law. Ius Commune Casebooks for the Common Law of Europe*, Portland, Hart, 2010, 39 with reference to ECJ C-402/03, *Skov AEG v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen*.

¹¹⁴ Or as T. HOBBS wrote it in 1651: "by this it appears how necessary it is for any man that aspires to true Knowledge, to examine the Definitions of former Authors; and either to correct them, when they are negligently set down; or to make them himselfe" (T. HOBBS, *Leviathan*, London, Andrew Crooke, 1651, 17).

credit law. We propose a three-part model and introduce the image of the 'Informed Consumer', the 'Advised Consumer' and at least the 'Weak Consumer'¹¹⁵.

The consumer image of the first category (the '*Informed Consumer*') corresponds to the consumer image developed by the Court of Justice in its jurisprudence on the internal market and unfair commercial practices. Legal provisions for this category are to be based upon the image of the average informed, observant and circumspect consumer who is searching information and can give an informed consent afterwards. Although he is formally free to enter into agreements, he nonetheless is in a weaker bargaining position as a consumer due to the initial information asymmetry. Providing correct and complete information is sufficient for him to take a correct and rational decision¹¹⁶. The legal provisions that are to be introduced for this category of consumers, ensure the substantive contractual freedom of the consumer. It is important that the information provided is accurate, realistic¹¹⁷ and sufficient and allows for comparison between creditors¹¹⁸.

The consumer image of the second category (the '*Advised Consumer*') is based on the condition precedent that a consumer does not always (fully) read or understand the information he receives. This consumer must receive additional personal advice before entering into a credit agreement. Based on the information obtained and the personal advice provided he can freely conclude a credit agreement. For this category of consumers the rules still ensure a substantive freedom of contract. However, they impose an additional mandatory information requirement to the creditor.

The consumer image of the third and last category (the '*Weak Consumer*'), is partly based on the results of behavioural economic studies that show that some consumers need permanent assistance. They can not take any rational decision, because they are financially incapable of doing so. Indeed any kind of information or advice here seems inefficient from a cost-benefit analysis. This group includes also the consumer who is, due to his weak financial situation, in

¹¹⁵ An impetus for diversification among consumers, we also found by M. DE MUYNCK, "Credit Cards, Overdraft Facilities and European Consumer Protection. A Blank Cheque for Unfairness?", *ERPL* 2010, 1223-1225; I. RAMSAY, "Regulation of consumer credit" in G. HOWELLS, I. RAMSAY, T. WILHELMSSON and D. KRAFT (eds.), *Handbook of research on international consumer law*, Cheltenham, Edward Elgar, 2010, 387; G. STRAETMANS, "Het Europese consumentenacquis: genese en toekomstblik" in J. MEEUSEN, G. STRAETMANS and A.-M. VAN DEN BOSSCHE (eds.), *Het EG-consumentenacquis: nu en straks*, Antwerp, Intersentia, 2009, 26-28.

¹¹⁶ In Germany we find a practical example. ING Diba AG offers on its website a comparison of its various products. The standard information offered consists of two parts. Firstly, the consumer obtains a schematic comparison of the key elements of the credit agreement. More specifically: the amount of credit ("*Kreditbetrag*"), the amount of the repayment and the repayment terms ("*Rate*"), the retributive interest rate ("*Sollzins*") and Annual Charge Rate ("*Effektivzins*") are published. However, the consumer can also, via a link, find out *in concreto* which credit agreement, in practice would best suit him. One speaks of a "*interaktiver Kredit -Check*". The consumer chooses, but at the end of the electronic questionnaire ING Diba indicates what type of its credit agreements *in concreto* is appropriate or not. Both options are offered to the consumer searching for a consumer credit agreement *sensu stricto* and for a mortgage loan.

Cf. <https://www.ing-diba.de/kredit/> (situation June 11, 2013).

¹¹⁷ Here we mean that the information offered, and perhaps especially vis-à-vis advertising, concerning certain services grossly corresponds with the reality. For example, one should not advertise (see art. 5. §1 WCK) for a mortgage credit for residential property which is repayable within five years. The information offered must allow the consumer to estimate the full scope and realistic and effective duration of its commitments.

¹¹⁸ Cf.: a study shows the wealthy customers attach great importance to the quality of the advices of their banker (the study related mainly to investments, current and savings accounts). Information on the offered product stands for them centrally. Cf. W. SINN, D. VATER, D. LUBIG and M. KASCH, *Was Bankkunden wirklich wollen*, Munich/Zürich, Bain & Company Germany/Switzerland Inc., 2012, 18-19.

a vulnerable position. For this group, the legal provisions must not only guarantee the substantive contractual freedom of the consumer, they should also ensure that there exists a (substantive) contract equilibrium, for example through the introduction of legal interest rate caps, rules on compound interest, default interest rate caps, etc.¹¹⁹. Here the corrective function of consumer contract law is the greatest. The legislator and the judge restrict the freedom of choice of the parties the most. Consequently one should be careful when classifying certain types of consumers into this category. Consumer contract law gets here, after all, a redistributive function.

B. Applicability in consumer credit legislation

44. *Applicability in consumer credit legislation* – After defining our three categories, we examine how the creditor can classify *in concreto* a consumer into one of the categories. The answer looks simple. The creditor, whether he grants credit to a professional borrower or to a consumer, shall examine his creditworthiness. He may use the results of this assessment to classify the prospective borrower into one of the categories. We introduce a 'know-your-borrower'-rule¹²⁰. Thus the creditor is able to restrict his operational costs, since he is obliged to perform a creditworthiness assessment¹²¹. We only propose to add *de lege ferenda* to this credit assessment a suitability assessment. In addition to assessing the financial strength, the creditor would question the prospective borrower about the content, scope,... and expectations about the credit agreement offered. On this basis, the creditor, could classify the (prospective) borrower into one of the three categories. The criteria used to categorize shall be made transparent and public. The borrower must be able to ascertain these criteria. Secondly, it is equally important that a court can review *a posteriori* the classification¹²². In addition, the supervisory authority for financial institutions could play a role in the approval and review of the criteria used by the creditor.

45. *Critical evaluation of the model* – New proposals must be received and evaluated critically. Although we argue below that the new model is not earth-shattering, we still try to refute some possible criticisms. Following three questions arise:

- How does the trend to extend consumer protection to other weaker contracting parties – such as SMEs – suit in the proposed model?
- Does the model not introduce an assessment *in concreto*? Do we not incur the risk of making the consumer image status dependent?

¹¹⁹ EESC, "Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers", *Pb.C.* September 30, 2003, 4, no. 2.2.4.5.; S. BROWN, "Using the law as a usury law: definitions of usury and recent developments in the regulation of unfair charges in consumer credit transactions", *J.B.L.* 2011, 102.

¹²⁰ J. KÖNDGEN, "Policy Responses to Credit Crises: Does the Law of Contract Provide an Answer?" in S. GRUNDMANN and Y.M. ATAMER (eds.), *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting*, Kluwer Law International, Alphen a/d Rijn, 2011, 50.

¹²¹ Either because of an explicit legal provision imposes on him the requirement or because he brings his liability (*culpa in contrahendo*) compromised.

¹²² The judge of peace is indeed competent *ratione materiae* to deal with cases concerning consumer credit agreements.

- How does this model relate to the proportionality rule¹²³ in consumer law?

An attentive reader will already have got some flashes of recognition. Our proposed Multi-Layered Consumer Image and its implementation sounds like to the 'know-your-client'-rule and the three categories of investor protection. The proposed model is based on intra- and interdisciplinary (legal) comparison. Intradisciplinary, because it falls back to the legal provisions on investor protection. From the MiFID legislation, we learn among others that the degree of the restrictions on freedom of contract of the financial institution do not necessarily have to be the same for every investor¹²⁴. Financial law already knows for some time the possibility to fill in the rules of conduct, the information requirements applicable to certain institutions, etc. differently depending on the category of persons entitled to protection¹²⁵. In this paper we proposed to extend the creditworthiness assessment by the creditor with a suitability test. The creditor must *de lege lata* examine each prospective borrower on its financial capacity. *De lege ferenda* he should also ascertain the financial capability of the prospective borrower.

Interdisciplinary we rely on certain behavioural economic studies that show that the group of consumers is not a homogeneous one. These studies show that some consumers are more susceptible to misleading information and are more financially incompetent than others¹²⁶. The group of consumer is too heterogeneous to enact rules based on one consumer image. A diversifying approach is more desirable.

The consumer credit law *sensu stricto* allows a certain degree of diversification of consumers. Article 5 (6) Directive 2008/48/EC obliges a creditor to provide to the consumer appropriate explanations so that the latter can make an informed decision. The appropriate explanation involves more than delivering a information leaflet with mere general information on interest rates, etc. It is an obligation to give personal advice. Opposite to our model article 5 (6) Directive 2008/48/EC suggests an assessment *in concreto* of each individual consumer, while our model consists of three abstract categories that determine the degree of legal or judicial restrictions/interference in the freedom of contract (of the creditor). However our model is not necessarily in contradiction with article 5 (6) Directive 2008/48/EC. We do not require the creditor to give each consumer a personalised appropriate explanation. In our model the personal appropriate explanations are limited to the second (and third) category of consumers. We only use the discretionary power left by the European legislator to the Member States to fill in the appropriate explanations depending on "*the specific circumstances of the situation in which the credit agreement is offered, the person to whom it is offered and the type of credit offered*"¹²⁷. Although we use an abstract category that introduces a seemingly *per se*

¹²³ J. DREXL, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, Tübingen, Mohr Siebeck, 1998, 362-363; E. SWAENPOEL, *Toetsing van het contractueel evenwicht*, Antwerpen-Cambridge, Intersentia, 2011, 531-532.

¹²⁴ S. GRUNDMANN and Y.M. ATAMER, "European Contract Law and Banking Contracts after the Financial Crisis: Challenges for Contracting and Market Transactions" in S. GRUNDMANN and Y.M. ATAMER (eds.), *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting*, Kluwer Law International, Alphen a/d Rijn, 2011, 15.

¹²⁵ Art. 45, §2, paragraph 2 WFT; L. VAN CAUTER, "De bescherming van de financiële consument – Een overzicht van het regelgevend kader" in H. DAEMS, I. DE MEULENEERE, R. FELTKAMP, C. HOUSSA and R. STEENNOT (eds.), *Bescherming van de consument in het financieel recht. La protection du consommateur en droit financier*, Limal/Antwerp-Oxford, Anthemis/Intersentia, 2012, 26.

¹²⁶ Cf. also T. VAN DYCK, *De geharmoniseerde prospectusplicht. Kritische analyse van de geharmoniseerde prospectusplicht in de Prospectusrichtlijn 2003/71/EG en haar omzettingen in België, Nederland, Frankrijk, het Verenigd Koninkrijk en Duitsland*, Bruges, Die Keure, 2010, 77.

¹²⁷ Art. 5 (6) *in fine* Directive 2008/48/EG (own emphasis added).

obligation to give personalised advice to certain categories of consumers. It is always up to the creditor to determine *in concreto* which consumer falls under which category. It remains, albeit indirectly, an assessment *in concreto* whether a consumer needs an personalised appropriate explanation¹²⁸. Thus, it does not go further than Directive 2008/48/EC. Although the content of the information and advice requirements are set *in abstracto*, a specific consumer is not blindly assigned to one category. Firstly, there will be a thorough *in concreto* assessment per individual consumer by the creditor. Based on the concrete result the consumer will be categorised into one of the categories. So there is no general *per se* obligation to provide advice or information to each consumer, but only for those consumers belonging to a category requiring additional protection. Also under article 5 (6) Directive 2008/48/EC, these consumers shall – even without categorisation in our model – obtain appropriate explanations to make an informed decision. The model can further absorb the rapid changes in the field of credit services without having to adapt each time the legislation¹²⁹. The basic principles of the model, i.e. only provide information, advice and information or permanent substantive support where needed, are independent of concrete products. Finally, as clarified above vis-à-vis investor protection, it is clear the multi-layered consumer image is not earth-shattering. Let us now discuss the above-mentioned three critical questions.

Firstly, it is clear that a multi-layered consumer image does not prevent the level of consumer protection provided to be extended to other weaker contracting parties such as SMEs. The legislator may subject professional borrowers to the same 'know-your-borrower' rule and offer them a similar protection¹³⁰.

The criticism that a multi-layered consumer image could degenerate into a 'status dependent' consumer image dividing consumers into compartments according to their education, their social origin, etc., is unjustified. An abstract distinction between categories of consumers does not stigmatise the individual consumer in a concrete situation. It also does not necessarily lead to social exclusion. To make a quip, a lawyer is not necessarily an Informed Consumer. Each consumer will have to demonstrate *in concreto* during the creditworthiness/suitability assessment his level of financial capability¹³¹. Moreover, *de lege lata* courts take already into account the specific situation of the (contracting) parties. Through the moderating effect of good faith, the court can indeed take into account in its assessment the weaker bargaining power of a particular contracting party.

¹²⁸ DE PATOUL indicates "*plus le candidat emprunteur est expérimenté et familier avec l'opération qu'il s'apprête à conclure, moins l'on se montrera exigeant quant à l'étendue des informations que le prêteur devra lui communiquer*". F. DE PATOUL, "Le devoir d'information et de conseil du prêteur" in C. BIQUET-MATHIEU and E. TERRY (eds.), *Hypothecair krediet – Crédit hypothécaire*, Bruges, Die Keure, 2010, 330.

Cf. also Liège January 28, 2010, *TBBR* 2010, 475; Brussels September 10, 1987, *TBH* 1989, 67; Kh. Ghent April 11, 1997, *TBH* 1998, 832; Kh. Brussels October 4, 1988, *JT* 1989, 456.

¹²⁹ DE MUYNCK argues for "*intelligent, multi-layered regulation*". M. DE MUYNCK, "Credit Cards, Overdraft Facilities and European Consumer Protection. A Blank Cheque for Unfairness?", *ERPL* 2010, 1217.

¹³⁰ Directive 2008/48/EC also does not preclude an extension of the scope *ratione personae* of the legislation of the member states of. Consideration 10 Directive 2008/48/EC allows Member States to extend their scope to other areas. This may be B2B credit agreements or, more limited, credit agreements to SMEs, start-ups, etc.

¹³¹ E.g.: when the 'Know-your-borrower'-rule suggests that the relevant consumer usually takes the correct decisions, and that he needs only some information about specific types of credit, he can still be placed in the category of 'Informed consumer' or at least in the category of the 'Advised Consumer'. The lender may be assured that the consumer concerned, after he has received the necessary generic or personalised information respectively, can take the rational credit decision.

The multi-layered consumer image also takes into consideration the subsidiarity and proportionality requirement. Under these requirements, preference should be given to the least intrusive legal measure and the least intrusive judicial action¹³². For the first two categories of consumers the mandatory information requirements and cooling-off periods should, in principle, be sufficient to ensure that the substantive contractual freedom is assured. For the Weak Consumer, the legislator and the courts should possibly also provide for a substantive assessment of the contract equilibrium.

§5. Conclusion.

46. *Substantive rules in consumer credit legislation* – Legislators introduce more and more restrictions on the freedom of contract of the stronger contracting party. In (consumer) credit legislation this trend was already present for a longer time. The lack of information and the weaker bargaining position resulting of the financial necessity to buy goods or services on credit is indeed more robustly present in (consumer) credit law. Most restrictions safeguard not only the substantive contractual freedom of the consumer, but they want to prevent that the consumer enters into a negative debt spiral (e.g.: rules of compound interest) or that he has to pay an unreasonable and unbalanced price for obtaining credit (e.g.: prohibition of usury interest and legal interest rate caps¹³³). In addition to these legal restrictions courts may also interfere in the contract equilibrium of the parties in case of unforeseen changes in circumstances. He may grant a deferred payment or other repayment facilities. These legal and judicial reviews mostly are in favour / are introduced protect the customer. It is justified by the lack of information and his weaker bargaining position.

47. *Multi-layered Consumer Image* – We introduced a multi-layered consumer image. Its goal is to distribute as efficiently as possible the need for legal consumer protection. Behavioural law and economics indicated that all consumers are in need of the same level of protection. For some mandatory information requirements is sufficient. For others advise or even substantive consumer protection, such as interest rate caps, are to be adopted. Our goal was to set up the legal framework. We strongly recommend economists to pick up this idea and enrol empirical studies to (i) analyse if the multi-layered consumer image can be a workable hypothesis in consumer credit law and (ii) provide empirical data that should enable legislators, courts, creditors... fine-tuning the legal framework in practice. Economists could empirically analyse if the multi-layered consumer image maximises the cooperative surplus of the contracting parties¹³⁴.

¹³² J. DREXL, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, Tübingen, Mohr Siebeck, 1998, 450-452; R. STEENNOT, "De impact van het privaat financieel recht op de wilsautonomie, de contractvrijheid en het consensualisme", <http://www.law.ugent.be/fli/wps/pdf/WP2010-15.pdf>, 2010, 37; J. STUYCK, "Consumentenbescherming in tijden van economische crisis", *Jura Falc.* 2009-2010, 327.

TH. WILSON, N. HOWELL and G. SHEEHAN, "Protecting the Most Vulnerable in Consumer Credit Transactions", *JconsP* 2009, 134, referring to a proposal from 2008 by the Australian "Productivity Commission" to give layered information to consumers.

¹³³ K. BYTTEBIER and M. FLAMÉE, "Het vraagstuk van ethisch financieren toegepast op de interestheffing mede vanuit en elementair rechtshistorisch perspectief. Stof voor een morele uitweg uit een wereld in (financiële) crisis in X. (ed.), *Een leven van inzet. Liber amicorum Michel Magits*, Mechelen, Kluwer, 2013, 33; H. DE WITH and A. NACK, "Der Moderne Schuldturm", *ZRP* 1984, 3; J.M. KEYNES, *A General Theory of Employment, Interest and Money*, London, Macmillan, 1936, 350.

¹³⁴ C. CAMERER, S. ISSACHAROFF, G. LOEWENSTEIN, T. O'DONOGHUE and M. RABIN, "Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism'", *U. Pa. L. Rev.* 2003, 1236-1237.

Johan VANNEROM

Attorney at Law, Janson Baugniet Brussels

Affiliated Researcher KU Leuven